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Office of Administrative Law Judges
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Issue Date: 31 October 2003

Case No: 2000-BLA 0491
BRB No.: 01-0505 BLA

In the Matter of

THOMAS GREGORY,
Claimant

v.

T & E COAL COMPANY,
Employer,

BITUMINOUS CASUALTY COMPANY,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER ON REMAND —AWARDING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

On February 25, 2000, this case was referred to the Office of Administrative Law Judges for a formal hearing. Following proper notice to all parties, a hearing was held on August 15, 2000, in London, Kentucky. The Director's exhibits were admitted into evidence pursuant to 20 C.F.R. § 725.456, and the parties had full opportunity to submit additional evidence and to present closing arguments or post-hearing briefs.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witness who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, and EX refer to the exhibits of the Director, claimant, and employer, respectively. The transcript of the hearing is cited as "Tr." and by page number.

ISSUES

1. whether the miner has pneumoconiosis as defined by the Act and regulations;

2. whether the miner's pneumoconiosis arose out of coal mine employment;

3. whether the miner is totally disabled;

4. whether the miner's disability is due to pneumoconiosis; and

5. whether the evidence establishes a material change in condition within the meaning of 20 C.F.R. § 725. 309(d).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

The claimant, Thomas Gregory, was seventy-nine years old at the time of the hearing and has a third grade education. He has one dependent, his wife, for purposes of possible benefits augmentation. (Tr. 9-10, DX 1) The claimant retired from coal mine work in 1985. (Tr. 13)

The claimant filed his first application for benefits on September 26, 1972. (DX 32.310) That claim was denied by the District Director, Office of workers' Compensation Programs ("OWCP") on April 10, 1981, and thereafter administratively closed on July 16, 1981. (DX 32.257) The OWCP determined that the Claimant had not established that any of the medical elements of his claim. (DX 32.257)

A second claim was filed on October 28, 1995. (DX 32.524) This claim was denied by Administrative Law Judge Steven E. Halpern on August 21, 1992. Judge Halpern accepted the parties' stipulation of sixteen (16) years coal mine employment. He determined that the claimant

had established coal workers' pneumoconiosis, but not total disability. (DX 32. 186) The claimant thereafter appealed to the Benefits Review Board ("the Board") which affirmed the denial on June 27, 1994. (DX 32. 130)

The claimant filed a third claim for benefits on September 20, 1995. (DX 32. 745) It was denied by Administrative Law Judge Paul H. Teitler on August 22, 1997. (DX 32.1) Judge Teitler found the presence of coal workers' pneumoconiosis established by medical opinion evidence under § 718.202(a)(4) and the presumption under § 718.203(b). However, as pneumoconiosis had been established in the previous claim, and as the evidence did not establish total disability, Judge Teitler determined that a material change in condition was not shown. As such, benefits were denied. The claimant did not appeal that denial. (DX 32)

The instant claim was filed on May 6, 1999. (DX 1) OWCP awarded benefits on August 24, 1999 and again on December 21, 1999. (DX 12, 13, 25) The employer timely requested a formal hearing, and the claim was forwarded to the Office of administrative Law Judges ("OALJ") on February 25, 2000. (DX 26, 27, 34) Following proper notice to all parties, a hearing was held before the undersigned on August 15, 2000 in London, Kentucky. On January 31, 2001, the undersigned issued a Decision and Order Awarding Benefits. The employer appealed this decision to the Board on February 26, 2001. On April 5, 2002, the Board issued a Decision and Order affirming in part and vacating in part my decision of January 31, 2001, and remanding the case to me for further consideration of the medical evidence in light of the Board's findings. Specifically the Board determined that I incorrectly weighed only the qualifying pulmonary functions studies and medical opinions supportive of total disability. The Board noted that I failed to adequately explain why I credited Dr. Burki's invalidation of the May 28, 1999 and September 28, 1999, pulmonary function studies over the opinions of the physicians who actually performed those tests. Accordingly, the Board vacated my finding that the newly submitted evidence established total disability pursuant to § 718.204 (c)(1), now § 725.204 (b)(2)(i). The Board also noted that I found total disability despite two non-qualifying arterial blood gas studies and the opinions of Drs. Dahhan and Fino, which found that claimant was totally disabled due to non-occupationally acquired respiratory conditions. Accordingly, the Board has also ordered that I re-weigh all of the newly submitted contrary probative medical evidence against the newly submitted medical evidence in support of total disability. The Board also found that I failed to adequately explain my reliance on the medical opinions of treating physicians Drs. Baker and Vora and has ordered that in my decision on remand that I explain my basis for assigning probative weight to these medical opinions. The board determined that I erred in finding the x-ray evidence in equipoise after I found the newly submitted x-rays insufficient to establish pneumoconiosis although the previously submitted evidence of record established pneumoconiosis. The Board has ordered that I independently re-weigh all of the x-ray evidence, old and new, and determine whether the record as a whole establishes the existence of pneumoconiosis pursuant to § 718.202(a)(1). Finally, the Board vacated my finding as to total disability due to pneumoconiosis and ordered that I reconsider the relevant medical evidence of record to determine if the requirements of §718.204(b) have been satisfied.

On May 16, 2002, Counsel for the claimant filed a motion seeking to re-open the record in this case for the receipt of additional medical evidence. An order was issued by me on July 10, 2002 instructing the parties to submit briefs on remand to address the issues of remand from the

Board. On August 6, 2003, my office received notice of the Claimant's death on July 4, 2003. Subsequent to my prior Decision and Order, the parties also indicated that a substantial amount of medical evidence had been generated since the last hearing before me in this case. Accordingly, I issued an Order on August 7, 2003, instructing the parties to submit any new additional medical evidence generated in this case since my award of benefits. In issuing this order I noted that 29 C.F.R. § 18.54 states:

> Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record.

Given the claimant's death, and the volume of medical evidence generated since my last decision and order in this case, I find that the submission and consideration of the new evidence is advisable and in the interest of judicial economy. I note that the employer in this case did not object to the submission of this new evidence. Accordingly, the following new evidence has been received into the record: 1.) the deposition testimony of Dr. Baker and pulmonary functions studies conducted by Dr. Baker on September 25, 2001, August 16, 2002, and August 26, 2002 (CX. 1) ; and 2.) the November 8, 2002 report of Dr. Dahhan (EX 3). The decision which follows is based upon all relevant medical evidence of record.

Medical Evidence

The medical evidence submitted in the prior claims for benefits was thoroughly summarized by Judges Halpern, Teitler, and myself. As such, it will not be repeated herein and is incorporated into this decision and order by reference. The following is a summary of the medical evidence submitted in conjunction with my August 7, 2003 Order.

Pulmonary Function Studies[1]

Exhibit/ Date	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Tracings	Comments
CX 1 9/25/01	Baker	80/ 67"	1.42	3.50	N/A	41%	No	
CX 1 8/16/02	Baker	81/ 67"	1.33	3.34	NA	40%	Yes	Moderate Obstructive Defect
CX 1 8/26/02	Baker	81/ 67"	1.63	3.92	N/A	42%	Yes	

The record contains the Deposition testimony of Dr. Baker taken on September 24, 2002. (CX 1) Dr. Baker testified he is board-certified in Internal Medicine and Pulmonary Disease and is a NIOSH B-reader. The claimant was examined by Dr. Baker in May 1999. Dr. Baker diagnosed occupational pneumoconiosis secondary to coal dust exposure with COPD, chronic bronchitis and a decreased PO2 in a non-smoker. The diagnosis was based upon x-ray, pulmonary functions studies, arterial blood gas analysis, and history. Dr. Baker determined that the claimant was totally disabled due to his coal mine employment history. The main bases for this finding was the results of the pulmonary function studies which indicated a moderate obstructive ventilatory defect. Dr. Baker testified that since the 1999 examination of the claimant, he had performed additional pulmonary function studies on September 25, 2001, in October, 2001, on August 16, 2002, and on August 26, 2002. Dr. Baker also stated an August 16, 2002, x-ray was positive for pneumoconiosis with a 1/0 profusion. Dr. Baker testified he saw the claimant approximately every eight weeks since 2001. In August of 2002, the claimant had a "flare-up"

[1] In order to demonstrate total respiratory disability on the basis of pulmonary function study evidence, a claimant may provide studies, which, accounting for sex, age, and height, produce a qualifying value for the FEV1 test, plus either a qualifying value for the FVC test, or the MVV test, or a value of FEV1divided by the FVC less than or equal to 55 percent. *See* Section 718.204(b)(2)(i)(65 Fed. Reg. 80049); 20 C.F.R. § 718.204(c)(1)(2000). "Qualifying values" for the FEV1, FVC and the MVV tests are measured results less than or equal to the values listed in the appropriate tables of Appendix B to 20 C.F.R. Part 718. *See Director, OWCP v. Siwiec*, 894 F. 2d 635, 637 n. 5, 13 BLR 2-259 (3rd Cir. 1990). Assessment of the pulmonary function study results is dependent on the Miner's height, which I find to be 67.2 inches for purposes of evaluating the pulmonary function studies. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983).

Moreover, the pulmonary function tables presented at Appendix B, 20 C.F.R. Part 718, show values for miners up to 71 years of age. For testing administered to the Miner when he was older than 71 years, I will reference the values listed for a miner 71years of age and extrapolate from that point. For example, the qualifying FEV1 value for 71-year old miner 67.3" tall is 1.66; the qualifying FVC value is 2.16 and the qualifying MVV is 67. Based on the variation of the FEV1 curves over changes in age for younger miners, I find that the qualifying values for this Miner range from 1.54 at age 78 to 1.51 at age 80 and 1.49 at age 81; for FVC curves, I find the qualifying values for this Miner are 2.04 at age 78, 2.00 for 80 and 1.99 at age 81; for MVV curves, I find the qualifying values for this Miner are 63 at age 78, 62 at age 80 and 61 at age 81.

of his respiratory condition and was seen for coughing, phlegm production, shortness of breath, and wheezing. Claimant was given a shot and some antibiotics. In an examination a few weeks later, claimant was doing better. Dr. Baker stated he had reviewed the September 29, 1999 report of Dr. Dahhan. As to Dr. Dahhan's findings that the claimant had significant improvement after bronchodilation, Dr. Baker stated that he disagreed with such findings. Dr. Baker noted that the definition of reversible obstructive airway disease was an improvement of greater that 20%. In the test performed by Dr. Dahhan, the claimant's improvement was only 11% to 12%. Accordingly, the reversible obstructive airway diagnosis by Dr. Dahhan was erroneous. Dr. Baker also disagreed with Dr. Dahhan's findings that the claimant does not suffer from pneumoconiosis. Dr. Baker stated the obstructive airway disease is now recognized by many experts as being coal dust-related. Specifically, the American College of Chest Physicians had determined five years earlier that obstructive airway disease could be caused by coal dust exposure. Dr. Baker also stated that he disagreed with Dr. Dahhan's determination that the Claimant has asthma. Dr. Baker opined that the claimant has chronic bronchitis. Dr. Dahhan determined that the reversible airway obstruction results were due to asthma. However, Dr. Baker stated that in asthma patients, pulmonary function studies are normal in between attacks of asthma, hence the reversible obstructive airway determination. Since the claimant had never had a normal spirometry, there was no evidence his defect was reversible and, accordingly, Dr. Baker opined that the claimant does not have asthma. Dr. Baker also stated that if the claimant has asthma as a result of dust exposure, he would have expected the claimant to have improved since his exposure to dust had ceased. Without further exposure to the offending agent, Dr. Baker explained, asthma-related conditions improve with time. In the claimant's case, his condition has continued since dust exposure ceased. This was indicative of coal dust causing his symptomatology rather than asthma aggravated by a coal dust working environment.

The record also contains the November 8, 2002 medical consultative report of Dr. Dahhan. (EX 3) In this report, Dr. Dahhan states he has reviewed additional medical evidence provided to him by counsel for the employer, including the deposition of Dr. Baker. In his report, Dr. Dahhan states that the testimony of Dr. Baker relating to the spirometry values of record indicate that the claimant suffers from a non-fixed amount of airway obstruction. Dr. Dahhan also noted that Dr. Baker is treating the Claimant with multiple bronchodilators which are used to primarily treat patients with a reversible obstructive airway disease. Dr. Dahhan opined that coal dust-related obstructive airway disease produces a fixed level of obstruction and ordinarily does not respond to bronchodilator therapy since the damage caused by coal dust exposure is permanent respiratory damage.

DISCUSSION AND APPLICABLE LAW

Because Mr. Gregory filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, Claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. § 725.202(d)(2)(i-iv). Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Pneumoconiosis and Causation

The new regulatory provisions at 20 C.F.R. § 718.201 contain a modified definition of "pneumoconiosis" and they provide the following:

> (a) For the purposes of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis.
>
> (1) Clinical Pneumoconiosis. 'Clinical pneumoconiosis' consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. 'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, 'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (Dec. 20, 2000). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Each shall be addressed in turn.

Under section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. In its decision and order of remand, the Board ordered that I weigh all of the x-ray evidence of record, both new and old to determine if the record as a whole establishes the existence of pneumoconiosis pursuant o§ 718.202(a)(1). Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). As noted above, I also may assign heightened weight to the

interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Clark*, 12 BLR 1-149 (1989).

The record considered by Judge Teitler included twelve x-ray interpretations of five films taken between May 19, 1995 and May 5, 1997. (DX 32.1) Of these interpretations, three were positive for pneumoconiosis and nine were negative for the disease. The three positive readings were rendered by two B-readers and the nine negative interpretations were rendered by three B-readers, three dually-qualified physicians and two readers whose qualifications were not listed in the record.[2] In the record considered by Judge Halpern, there were six x-rays taken between February 1, 1988 and March 11, 1992. These films were reviewed a total of thirteen times. Of those films, six interpretations were negative for pneumoconiosis and seven were positive for pneumoconiosis. The six negative interpretations were rendered by three dually-qualified physicians and two B-readers. The seven positive readings were rendered four dually-qualified physicians, one B-reader, and one physician whose qualifications are not listed in the record. The record also contains five films taken between November 8, 1972, and July 31, 1986. There are eleven interpretations of these films. Of the eleven interpretations, only one reading was positive and was rendered by a physician whose qualifications are not listed in the record. The ten negative interpretations were rendered by five dually-qualified physicians, two B-readers, and two physicians whose qualifications are not listed in the record. The x-ray evidence submitted in the instant claim consisted of twelve interpretations of two films. All twelve interpretations were negative for pneumoconiosis and were rendered by ten dually-qualified physicians and two B-readers.

The issue of numerical superiority often arises with regard to evaluating medical evidence. The Board has held that an administrative law judge is not required to defer to the numerical superiority of medical evidence, *Wilt v. Wolverine Mining Co.*, 14 B.L.R. 1-70 (1990), although it is within his or her discretion to do so, *Edmiston v. F & R Coal Co.*, 14 B.L.R. 1-65 (1990). *See also Schetroma v. Director, OWCP*, 18 B.L.R. 1-19 (1993) (use of numerical superiority upheld in weighing blood gas studies); *Tokaricik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1984) (the judge properly assigned greater weight to the positive x-ray evidence of record, notwithstanding the fact that the majority of x-ray interpretations in the record, including all of the B-reader reports, were negative for existence of the disease).

Because the negative readings constitute the vast majority of the interpretations and are verified by more, highly-qualified physicians, I find that the x-ray evidence is negative for pneumoconiosis.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy or autopsy evidence. This section is inapplicable herein because the record contains no such evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no

[2] Several of these readings were rendered by the same physicians.

such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions applies to this claim, claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides the fourth and final way for a claimant to prove that he has pneumoconiosis. Under section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion may support the presence of the disease if it is supported by adequate rationale besides a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 1-22, 1-24 (1986). The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions.

A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 BLR 1-130 (1979).

A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1292 (1984). *See also Phillips v. Director, OWCP*, 768 F.2d 982 (8th Cir. 1985); *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984); *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis); *Waxman v. Pittsburgh & Midway Coal Co.*, 4 B.L.R. 1-601 (1982).

In the previous Decision and Orders by Judge Teitler and Judge Halpern, both Judges determined that pneumoconiosis had been established based upon the medical narrative evidence of record. Both Judges thoroughly discussed and considered the medical narrative evidence of record presented to them and I find no mistake in the determination of fact by either Judge. The Board has also considered the findings made by both Judges Teitler and Halpern and affirmed their respective findings. In the instant claim for benefits, the parties have offered the opinions of Drs. Baker, Fino, and Dahhan. Dr. Baker opined that the Claimant suffers from pneumoconiosis while Drs. Fino and Dahhan determined that he does not. I do not find the opinions of Drs. Dahhan and Fino sufficient to establish a material change in condition so as to reverse the prior finding of pneumoconiosis made by Judges Teitler and Halpern and the Board. In doing so, I note that I find the opinion of Dr. Dahhan on the issue of pneumoconiosis hostile to the act. In his report of September 29, 1999, Dr. Dahhan states, in part, that Mr. Gregory has not "had any exposure to coal dust since 1985, a duration of absence sufficient to cause cessation of any

Industrial bronchitis that he may have had." I also find the report of Dr. Fino hostile to the act as he stated that "industrial bronchitis resolves itself within six months of leaving the mines." The Board has held that the administrative law judge may discredit the opinion of a physician whose medical assumptions are contrary to, or in conflict with, the spirit and purposes of the Act. *Wetherill v. Green Construction Co.*, 5 B.L.R. 1-248, 1-252 (1982). The statements made by Drs. Dahhan and Fino indicate a belief on their part that pneumoconiosis and disability resulting therefrom will no longer manifest itself upon cessation of dust exposure. Pursuant to the new regulations, " 'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure. " §718.201(c). Accordingly, I find the opinions of Drs. Fino and Dahhan hostile to the act and entitled to little probative weight on this issue.

In my previous decision and order, I also assigned greater probative weight to the opinions of Drs. Vora, Baker, Vasey, Bushey, Wells, Jones, and Asher, the physicians of record who diagnosed pneumoconiosis. In crediting the opinions of Drs. Baker and Vora, I assigned greatest probative weight to these physicians because of their standing as the claimant's treating physicians. More weight may be accorded to the conclusions of a treating physician as he or she is more likely to be familiar with the miner's condition than a physician who examines him episodically. *Onderko v. Director, OWCP,* 14 B.L.R. 1-2 (1989); *Tussey v. Island Creek Coal Co.,* 982 F, 2d 1036, 17 BLR 2-16 (6th Cir. 1993). However, in *Collins v. J & L Steel (LTV Steel),* 21 B.L.R. 1-182 (1999), the Board held that it was error for the administrative law judge to give greater weight to a treating physician's opinion without addressing its "flaws". An administrative law judge "is not required to accord greater weight to the opinion of a physician based solely on his status as claimant's treating physician. Rather, this is one factor which may be taken into consideration . . .." *Tedesco v. Director, OWCP,* 18 B.L.R. 1-103 (1994). Other factors to be considered include whether the report is well-reasoned and well-documented. *McClendon v. Drummond Coal Co.*, 12 B.L.R. 2- 108 (11th Cir. 1988) (a well-reasoned, well-documented treating physician's report may be given greater weight); *Amax Coal Co. v. Franklin*, 957 F.2d 355 (7th Cir. 1992) (a treating physician's report which is not well-reasoned or well-documented should not be given greater weight); *Amax Coal Co. v. Beasley*, 957 F.2d 324 (7th Cir. 1992). Similarly, in *Lango v. Director*, OWCP, 104 F.3d 573 (3d Cir. 1997), the court held that a treating physician's opinion may be accorded greater weight than the opinions of other physicians of record but "the ALJ may permissibly require the treating physician to provide more than a conclusory statement before finding that pneumoconiosis contributed to the miner's death." Moreover, the length of time in which the physician has treated the miner is relevant to the weight given the physician's opinion. *Revnack v. Director, OWCP*, 7 B.L.R. 1-771 (1985). It is logical that a physician who recently began "treating" the miner will not necessarily have a more thorough understanding of the miner's condition than other examining physicians of record. *Gomola v. Manor Mining & Contracting Corp.*, 2 B.L.R. 1-130, 1-135 (1979) (the length of time a particular physician treats a claimant is a valid factor to be considered in the weighing process).

Reviewing the opinions of Drs. Baker and Vora, I find that they are entitled to great weight. First, I find the opinions of both physicians to be well-reasoned and well documented. Both physicians, most notably Dr. Baker, have examined the claimant on numerous occasions. The earliest examination of record by Dr. Baker dates back to 1985. In his deposition testimony, Dr. Baker indicated that he saw the claimant approximately every eight weeks since 2001. Dr.

Vora indicated in his August 28, 1995 report that he had treated the claimant since September 1990. Both physicians conducted multiple laboratory tests. Both physicians have treated the claimant specifically for his respiratory ailments. Dr. Baker indicated that in addition to his own examinations of the claimant he had reviewed the findings of other physicians of record. These multiple examinations and test results reviews by both physicians over a period of many years demonstrates an intimate familiarity with the claimant's overall respiratory and pulmonary conditions. Accordingly, I find that the opinions of Drs. Baker and Vora are entitled to great probative weight and find that their opinions, in conjunction with those rendered by Drs. Vaezy, Bushey, Wells, Jones, and Asher establish that pneumoconiosis is present.

Once it is determined that the miner suffers (or suffered) from pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a).

Because Mr. Gregory has established over ten years of coal mine employment, he is entitled to a rebuttable presumption that his pneumoconiosis arose from coal mine employment. *See* 20 C.F.R. § 718.203(b). This presumption may be rebutted by evidence demonstrating another cause for claimant's pneumoconiosis. The employer has proffered no evidence to show another cause for claimant's pneumoconiosis. Accordingly, I find that Mr. Gregory's pneumoconiosis arose from coal mine employment.

In sum, the evidence establishes that Mr. Gregory has pneumoconiosis and that his pneumoconiosis arose out of coal mine employment. In order to establish entitlement to benefits, however, the evidence also must establish that claimant is totally disabled due to pneumoconiosis.

Total Disability Due to Pneumoconiosis

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204 (b)(1). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204(b)(2) provides several criteria for establishing total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Under Sections 718.204(b)(2)(i) and (b)(2)(ii), total disability may be established with qualifying pulmonary function tests or arterial blood gas studies. All ventilatory studies of record, both pre-bronchodilator and post- bronchodilator, must be weighed. *Strako v. Ziegler Coal Co.*, 3 B.L.R. 1-136 (1981). To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight

to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited "poor" cooperation or comprehension. *See, e.g., Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984).

In the decision and order by the Board, the Board determined that I erred in my weighing of both the qualifying pulmonary functions studies of record and the medical opinion evidence supportive of total disability. In my prior decision I determined that the spirometry of July 16, 1999 produced qualifying values. I note that at the time of the 1999 tests the claimant was 78 years old. The tables in Appendix B used to determine total disability based upon the pulmonary function studies only contain qualifying values applicable to age 71. Accordingly, I extrapolated values for a miner who is older than 71 at the time of test pursuant to *Hubbell v. Peabody Coal Co.*, BRB No. 95-2333 BLA (Dec. 20, 1996 (unpub.) and *Fraley v. Peter Cave Coal Mining Co.*, BRB No. 99-1279 BLA (November 24, 2000) (unpub.). Using the extrapolated calculations for FEV1, FVC and MVV determined infra and in reviewing the pulmonary functions studies subitted with the instant claim, I note that every test conducted since 1999 produced qualifying values except the August 26, 2002 study[3]. At the time of the tests in 2001 and 2002, the claimant was 80 and 81 years old respectively. I assign little probative weight to the test of September 25, 2001 as no tracings of this test are included in the record. I also assign less probative weight to the tests of May 28, 1999, performed by Dr. Baker and September 23, 1999, performed by Dr. Dahhan, as both tests were invalidated by Dr. Burki. Little or no weight may be accorded to a pulmonary function study where the Claimant exhibited "poor" cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 BLR 1-1141 (1984); *Runco v. Director, OWCP*, 6 BLR 1-945 (1984); *Justice v. Jewell Ridge Coal Co.*, 3 BLR 1-547 (1981) In assessing the reliability of a study, an administrative law judge may accord weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). However, more weight may be given to the observations of technicians who administered the studies than to physicians who reviewed the tracings. *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Indeed, if the judge credits a consultant's opinion over one who actually observed the test, a rationale must be provided. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Further, a consulting physician who merely places a checkmark in a box indicating "poor or unacceptable technique," without explanation, has not provided sufficient evidence to support his or her rejection of the study. *Gabino v. Director, OWCP*, 6 BLR 1-134 (1983). Given his expertise in this area, and the fact he invalidated the two tests on objective grounds, including notations made by the administering technician and the curve shapes, I accord great weight to Dr. Burki's opinion and find the results of these two pulmonary function studies invalid.

The newly submitted tests of record which are qualifying and valid are those conducted on July 16, 1999, and August 16, 2002; and the August 26, 2002, is close to qualifying.

[3] The FEV1 value, 1.63, is below the table value for a miner of 67.3" and 71 years of age, but not when the FEV1 value is extrapolated to age 78.

Accordingly, I find that the newly submitted pulmonary function studies establish total disability pursuant to §718.204(b)(2)(i).

All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated).

The arterial blood gas studies submitted after the previous denial conform to the applicable quality standards. The tests did not produce qualifying values, however. Accordingly, I find they present probative arterial blood gas evidence which weighs against a finding that Claimant is totally disabled.

Section 718.204(b)(2)(iii) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

Where a claimant cannot establish total disability under subparagraphs (b)(2)(i), (ii), or (iii), Section 718.204(b)(2)(iv) provides another means to prove total disability. Under this section, total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 BLR 1-130 (1979). A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

In assessing total disability under § 718.204(b)(2)(iv), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Budash v. Bethlehem Mines Corp.*, 9 B.L.R. 1-48, 1-51 (holding medical report need only describe either severity of impairment or physical effects imposed by claimant's respiratory impairment sufficiently for administrative law judge to infer that claimant is totally disabled).

Once it is demonstrated that the miner is unable to perform his or her usual coal mine work, a prima facie finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "com-parable and gainful work" pursuant to § 718.204(c)(2). *Taylor v. Evans & Gambrel Co.,* 12 B.L.R. 1-83 (1988).

In my prior decision and order, I considered the newly submitted reports of Drs. Baker, Dahhan and Fino. The parties have also recently submitted the deposition testimony of Dr. Baker and a new medical consultative report by Dr. Dahhan. Dr Baker in his May 28, 1999 report, found the claimant totally disabled due to pneumoconiosis. Dr. Baker continues to reiterate these findings in his deposition. Dr. Dahhan also found the claimant totally disabled in his September 29, 1999 report, however, he determined the cause of the disability was non-occupationally acquired asthma. Dr. Fino too found the claimant totally disabled due to an non-occupationally acquired cause. Accordingly, I find that the medical narrative evidence of record supports a finding of total disability.

In its decision of April 5, 2002, the Board vacated my earlier finding of total disability, finding that my analysis was violative of the holdings set forth in *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989), *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987) and *Shedlock v. Bethlehem Mines Corp.,* 9 BLR 1-195 (1986). These decisions require an administrative law judge to weigh all of the newly submitted contrary probative evidence against the newly submitted evidence in support of total disability. *Id.* The Board has instructed me pursuant to those cases cited above to reconsider all of the newly submitted evidence to determine if total disability has been established pursuant to § 718. 204(b). Reviewing the newly submitted medical evidence of record I note that every physician of record of who addressed the issue of total disability found that the claimant was totally disabled. Furthermore, as is discussed in detail above, I have found the majority of the newly submitted pulmonary functions study evidence indicative of total disability, as the record contains two qualifying tests performed since 1999 and one nearly qualifying test. Evidence of cor pulmonale does not weigh for or against the claimant, as no evidence of that condition has been presented in this claim. The only evidence of record which would tend to demonstrate that the claimant is not totally disabled is the arterial blood gas results. However, I find the results of these test outweighed by the other evidence of record, particularly so by the narrative medical evidence of record. In finding thusly, I find that the physicians reports are the most reliable source of evidence regarding this issue as they take into consideration multiple sources of data including tests results, physical examinations, symptomatology and subjective complaints. These reports of record, combined with the spirometry results, demonstrate that the claimant is totally disabled. Accordingly, I find that claimant has established a material change in condition.

Reviewing the older evidence of record, I find that the record as a whole supports a finding of total disability. While the bulk of the pulmonary function studies of record are non-qualifying or invalid, the most recent tests of record are indicative of total disability. In the prior decision by Judge Teitler, three of seven pulmonary function studies produced qualifying values. Of the tests performed between 1985 and 1990, no test of record produced qualifying values. None of the tests considered by Judge Halpern were both qualifying and valid. Reviewing the pulmonary function study evidence of record, I assign greater probative weight to the more

recent studies of record given the progressive nature of pneumoconiosis. Accordingly, I assign greater weight to the studies of July 16, 1999, August 16, 2002, and August 26, 2002 and find that total disability due to pneumoconiosis has been established by the majority of these studies.

The vast majority of the arterial blood gas analyses of record do not indicate the presence of a totally disabling respiratory or pulmonary defect. Accordingly, I find that the blood gas evidence of record fails to establish total disability pursuant to §718.204 (b)(2)(iii)

In the decision by Judge Teitler, four physicians of record rendered an opinion on the issue of total disability. Drs. Vaezy, Fino, and Dahhan each determined that the claimant maintained the respiratory capacity to perform his last coal mine employment. Dr. Baker found the claimant totally disabled. In the decision by Judge Halpern, Drs. Dahhan, each determined that the Claimant was not totally disabled. Drs. Wells and Baker determined that the claimant could not perform his last coal mine employment. Between 1985 and 1990, the claimant was examined by four physicians for the purposes of determining pneumoconiosis and total disability arising there from. Drs. Baker and Well both found the claimant totally disabled. Dr. Dahhan did not find the claimant totally disabled. Drs. Vora and Bushey did not comment on the issue of total disability. Reviewing the medical narrative evidence of record, I assign greatest probative weight to the most recent evidence of record given the progressive nature of pneumoconiosis. Accordingly, I find the recent opinions of Drs. Baker, Dahhan, and Fino entitled to great probative weight on this issue. While these physicians disagree on the issue of causation, all three determined that the claimant does suffer from a totally disabling respiratory or pulmonary impairment.

Reviewing the medical record in its entirety, I find that the evidence of record establishes that the claimant is totally disabled. In doing so, I rely primarily on the most recent medical narrative reports and pulmonary functions studies of record. Given the progressive nature of pneumoconiosis, I find the older medical reports and test results of record entitled to less weight. The exertional requirements of the claimant's last coal mine job are discussed several times in the record. I have reviewed these entries and have determined that the level of impairment discussed by Drs. Dahhan, Fino, and Baker would prevent the claimant from performing his last coal mine employment, were he still alive. It is also evidence from their various reports that Drs. Dahhan, Fino and Baker each understood the exertional nature of the claimant's last coal mine employment and took the exertional requirements into consideration in rendering their respective opinions.

Because the Claimant has demonstrated that he suffers from a totally disabling respiratory or pulmonary impairment, he must next establish that his total disability is due to pneumoconiosis. 20 C.F.R. § 718.204(c)(1). To satisfy this requirement, Claimant must demonstrate that his pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. *Id.* Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it: (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. *Id.* Claimant can only demonstrate the cause of his total disability by means of a physician's documented and well reasoned medical report. 20 C.F.R. § 718.204(c)(2).

In assessing this element of entitlement, I once again assign greatest probative weight to the most recent opinions of record given the progressive nature of pneumoconiosis. Reviewing that most recently submitted evidence in conjunction with the older evidence of record, I find that the claimant has established he suffers from an occupationally acquired totally disabling respiratory condition. In finding this element established, I rely primarily on the recent report and deposition testimony of Dr. Baker. I find his reports to be well reasoned, well-documented and based upon the objective laboratory data of record. I also find that because he has standing as the claimant's treating physician, his opinion is entitled to great probative weight. Dr. Baker has a long history of examining the claimant dating back to 1985. He has examined the claimant on many occasions and, as he noted at his deposition, he has only ever treated the claimant for his respiratory conditions. Furthermore, Dr. Baker examined the claimant at regular eight week intervals from 2001 until the claimant's death in 2003.

I assign less probative weight to the reports of Dr. Dahhan on this issue. I note that in all of his recent reports of record, Dr. Dahhan places greatest emphasis on his finding that the claimant's disability is due to asthma. I note that neither of Mr. Gregory's treating physicians of record, notably Drs. Baker or Vora, ever diagnosed the claimant with asthma. Furthermore, Dr. Baker specifically states in his deposition that the claimant does not have asthma and elucidates several reasons for his conclusion. Dr. Dahhan had an opportunity to contradict Dr. Baker's deposition statements in his November 8, 2002 report. However, I find the follow up statement by Dr. Dahhan inadequate to contradict the rationale of Dr. Baker. As is discussed above, I also find at least one report of Dr. Dahhan, the report of September 29, 1999, hostile to the act. Dr. Dahhan's statement that claimant has not "had exposure to coal dust since 1985, a duration of absence sufficient to cause a cessation of any industrial bronchitis he may have had" tantamount to saying that pneumoconiosis and its resulting disability are not latent and progressive. Dr. Dahhan also spends a great deal of time discussing the fact the pulmonary function study he did on September 23, 1999 showed a significant response by the claimant to bronchodilation. As such, Dr. Dahhan concludes that the claimant has a reversible airway defect and that reversible airway defects are not indicative of a totally disabling respiratory impairment caused by pneumoconiosis. I begin by noting that the very pulmonary function study that Dr. Dahhan relies so heavily upon in this analysis was *invalidated* by Dr. Burki. As is discussed above, I find the report of Dr. Burki probative on the validity of this spirometry given Dr. Burki's excellent qualifications and because his invalidation of the test was based upon objective reasons, i.e. curve shape and variability in the test results. Dr. Dahhan in his November 8, 2002 report relies upon the September 25, 2001 spirometry performed by Dr. Baker in expounding his reversible airway theory. However, I also note that I have discounted, this test as it contained no tracings. The flow volume loop was found invalid by Dr. Baker himself as exhalation was not completed. Two other spirometry studies relied upon by Dr. Dahhan in his November 8, 2002 report, tests conducted on October 15, 2002 and October 25, 2001, are not included in the record and therefore are not subject to review for validity. As was noted in my earlier decision, I also find that Dr. Dahhan does not convincingly show that the claimant demonstrated a significant response to bronchodilation in the first place. I also assign less probative weight to the opinion of Dr. Dahhan, as I find that he fails to adequately explain how the claimant's lengthy coal mine employment history has played no role in his overall respiratory health, given in particular that the claimant is a non-smoker. Finally, I note that the statute and the regulations do not exclude a

finding of total disability due to pneumoconiosis where the results of pulmonary function studies demonstrate a reversible component.

I also assign less probative weight to the opinion of Dr. Fino on the issue of total disability causation. For the reasons discussed in detail above, I find Dr. Fino's April 5, 2000 report hostile to the act. As is discussed in my prior decision, like Dr. Dahhan, Dr. Fino does not convincingly show that claimant had a significant response to bronchodilation upon comparison of the spirometry data. Like Dr. Dahhan, several of the pulmonary functions studies Dr. Fino relied upon were invalid for various reasons. Dr. Fino also fails to adequately explain how the claimant's lengthy coal mine employment history has played no role in his development of a totally disabling respiratory impairment.

As the better reasoned and better documented medical reports of record establish the existence of a totally disabling respiratory impairment, I find that the claimant has established this element of entitlement.

Entitlement

The Claimant has established a material change in condition. As the Claimant has established that he has pneumoconiosis, arising out of coal mine employment, is totally disabled and that such totally disability is due to pneumoconiosis, I find that he is entitled to benefits under the Act.

Date of Entitlement

As the evidence shows that the claimant was totally disabled at the time he filed this claim for benefits on May 6, 1999, the claimant is entitled to benefits beginning May 1, 1999. 20 C.F.R. §725.503.

Attorney's Fee

Claimant's counsel has thirty days to submit an application for an attorney's fee. The application shall be prepared in strict accordance with 20 C.F.R. §§ 725.365 and 725.366. The application must be served on all parties, including the claimant, and proof of service must be filed with the application. The parties are allowed thirty days following service of the application to file objections to the fee application.

ORDER

The Employer is hereby ORDERED to pay the following:

1. To Claimant, Thomas Gregory, all benefits to which he is entitled under the Act, augmented by his reason of his one dependent, commencing ;

2. To Claimant, all medical and hospitalization benefits to which he is entitled,

3. To the Secretary of Labor, reimbursement for any payment the Secretary has made to claimant under the Act. The employer may reduce such amounts, as appropriate, from the amounts the employer is ordered to pay under paragraph 1 above; and,

4. To the Secretary of Labor or to claimant, as appropriate, interest computed in accordance with the provisions of the Act or regulations.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. This decision shall be final thirty days after the filing of this decision with the district director unless appeal proceedings are instituted. 20 C.F.R. § 725.479. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington,